BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES C. HUEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,025,950
TARLA MANAGEMENT COMPANY	)	
Respondent	)	
AND	)	
	)	
COLUMBIA INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the December 27, 2005 preliminary hearing Order of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits in the form of temporary total disability compensation and ongoing medical care after the Administrative Law Judge (ALJ) determined that claimant suffered accidental injury arising out of and in the course of his employment with respondent.

For purposes of clarification, it is noted that both the Order For Compensation and the Application For Review filed in this matter incorrectly display Docket No. 1,029,950. The correct docket number in this matter is 1,025,950.

ISSUES

1. Did claimant suffer personal injury by accident?

2. Did claimant's accidental injury arise out of and in the course of his employment with respondent?

Claimant contends that he tripped and fell on September 27, 2005, while employed with respondent. Respondent contends that the accident, as described by claimant, could not possibly have happened in the time frame available. That is the only dispute before the Appeals Board (Board) for its consideration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Board finds the Order of the ALJ should be affirmed.

Claimant alleges accidental injury on September 27, 2005, when, as he was exiting respondent's building, he tripped over a radio, losing his balance, grabbing a door as he was going down, twisting his body around and landing on his buttocks. This caused him immediate pain in his low back and right shoulder (the arm with which he grabbed the door). Claimant uttered a cuss word, arose from the floor and left the building. Respondent's management and compliance supervisor, Chanda Lutz, who was in an office nearby, testified that the accident, as described by claimant, could not have occurred in that manner as, in her opinion, there was not sufficient time for claimant to have fallen, gotten up off the floor and walked out of the office. She testified she was under her desk, hooking up a telephone cable, and was only under the desk for approximately 15 seconds.[1] When she got up from the floor, she noticed claimant had exited the building and was on the sidewalk outside the building, walking past the window. Ms. Lutz and a co-worker attempted to recreate the accident and determined that there was not sufficient time for the accident to have occurred in that fashion.

Respondent further contends that claimant's injuries as described to William A. Bailey, M.D., are the same or very similar to injuries displayed by claimant at both Dr. Bailey's office and the VA Hospital prior to the alleged date of accident. Claimant acknowledges significant preexisting problems, having suffered numerous work- and non-work-related injuries and having undergone surgery to his neck and right shoulder prior to the accident with respondent. However, claimant testified that while he was in some pain before the date of accident, he had recovered from the earlier incidents and was capable of performing his job duties as a working maintenance supervisor for respondent before the fall. After claimant suffered the injuries on September 27, 2005, he was placed on restrictions by Dr. Bailey and was unable to perform the heavy labor required of his maintenance supervisor position.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

> The two phrases "arising out of" and "in the course of" used in K.S.A. 44-501,
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> have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and

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[1] P.H. Trans. at 31-32.

[2] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

> means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[3]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[4]

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[5]

An accidental injury is compensable even where the accident serves only to aggravate a preexisting condition.[6]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[7]

In this instance, the ALJ had the luxury of observing both claimant and Ms. Lutz testify at the preliminary hearing. An administrative law judge in that situation has the opportunity to assess the credibility of the witnesses during live testimony. That opportunity is not presented to the Board. The Board has on many occasions given some deference to an administrative law judge's ability to ascertain the witness credibility in those circumstances. Here, the ALJ apparently determined that claimant's testimony was the more credible, considering the conflict between the witness descriptions of the incident. The Board also notes that Ms. Lutz acknowledged that she was under the desk for

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[3] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[4] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[5] K.S.A. 44-501(g).

[6] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

[7] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

approximately 15 seconds before getting up. The record does not explain whether the 15 seconds occurred before, during or after the alleged trip and fall.

The Board, therefore, finds for preliminary hearing purposes that, while it is a close call, claimant has proven that he suffered accidental injury arising out of and in the course of his employment with respondent on the date alleged.

The preliminary hearing determination shall not be binding in a full hearing on this claim, but shall be subject to a full presentation of the facts.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated December 27, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 2006.

BOARD MEMBER

c: James L. Wisler, Attorney for Claimant
Scott J. Mann, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director